1982

C&J Industries, Inc. et al v. Edward O. Bailey et al : Brief of Defendants-Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

C & J INDUSTRIES, INC., a corporation, A. ROBERT COLLINS and GLADE N. JAMES,	)	
Plaintiffs-Appellants,	)	Case No. 18327
vs.	)	
EDWARD O. BAILEY and RUTH C. BAILEY, his wife,	)	
Defendants-Respondents.	)	

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

STATEMENT OF THE CASE

As previously set forth, the issue before this court is whether the acts of Plaintiffs-Appellants triggered an acceleration clause in a contract which provides:

> "In the event Buyer desires to sell or assign, transfer or convey Buyer's rights under this contract or Buyer's interest in said premises then and in that event the Buyer must pay in full the outstanding balance due on this contract prior to said transaction."

POINT I

THE HOLDING OF THE TRIAL COURT THAT COLLINS AND JAMES WERE BUYERS UNDER THE BAILEY CONTRACT IS IN CONFLICT WITH THE HOLDING OF THIS COURT ON THE FIRST APPEAL OF THIS CASE AND SHOULD BE REVERSED UNDER THE PRINCIPLE OF THE LAW OF THE CASE.

On the first appeal of the instant case, this court determined that:

> "It is apparent from the second contract -- and the Baileys consistently point out -- that the buyer under the first contract, C & J, is not the seller under the second contract." 618 P.2d 58, 59.

and:

> "This court cannot as a matter of law ignore the corporate status of C & J Industries, Inc., and thereby equate C & J with the individuals Collins and James." Ibid, 59, 60.

Both the finding that the buyer on the first contract was not the seller on the second contract and the finding that the corporate status of C & J must be recognized were necessary to the disposition made on appeal. A finding to the contrary on either issue would have concluded the case in favor of the Respondents (Baileys).

In the instant appeal, Respondents seek to uphold the decision of the trial court that the buyer on the first contract was also the seller on the second contract.

Respondents assert as an alternative basis for affirmance that this court ignore the corporate status of C & J by applying the "alter ego" principle. Both of these arguments are in clear conflict with the holdings of this court on the initial appeal.

> "The principle of the 'law of the case' has been recognized by this court. Where questions of law and fact are the same the decision on the first appeal becomes the law of the case and is binding upon the parties; upon the trial court; and upon the appellate court. And this is so however disputed or controversial the law involved may be." Davis v. Payne & Day, Inc., 363 P.2d 498 (Utah 1961); Petty v. Clark, 192 P.2d 589 (Utah 1948); Helper State Bank v. Crus, 81 P.2d 359 (Utah 1938).

The policy behind "the law of the case" was expressed in Lincoln National Life Ins. Co. v. Roosth, 306 F.2d 110 (5th Cir., 1962). Where there is no change in the factual situation and only a question of law is decided,

> ". . .[A] most important consideration is stability in the law -- a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned. . . . Without implying any improper purpose to litigants or their counsel, or acknowledging anything more than, as

> human beings, Judges will unavoidably have differences in emphasis, approach or view on close questions in given areas, if the practice is followed for each succeedng panel to arrive at its own decisions, the losing party on the first appeal will naturally strive to bring it back a second, third or fourth time until all are exhausted." Ibid at 117.

It would be unfortunate if on a second appeal counsel felt free to argue again, as a matter of course, points decided on a previous appeal. White v. Higgins, 116 F.2d 312 (1st Cir., 1940).

In the instant case, this court made a determination of law, after examination of the contracts in question, that the buyer on the first contract was not the seller on the second contract. The case was then remanded for a determination of agency. When the trial court made a finding on the agency issue, it was to enter judgment for the appropriate party.

The holding of the trial court on the issue of who was buyer under the contract reopened an issue already determined by this court. The same contracts were presented and examined and only a question of law was to be determined. Under the law of the case, the holding of this court on the original appeal must stand and the holding of the trial court must be reversed.

The same reasoning applies to the attempt to have this court ignore the corporate status of C & J Industries through application of the alter ego principle. This court has already determined that C & J Industries cannot be equated with the individuals Collins and James. No new evidence was introduced on remand to show a need for application of this equitable remedy. This court is being asked to abandon its former determination of an issue upon a mere presumption that inequity may occur. Clearly application of the law of the case is appropriate in this instance.

POINT II

COURTS OF THIS STATE MAY NOT, IN THE GUISE OF INTERPRETATION, ALTER THE UNAMBIGUOUS TERMS OF A CONTRACT BY WHICH THE PARTIES IDENTIFIED AND DEFINED THAT A CORPORATION WAS "BUYER" IN THAT CONTRACT.

The issue in the instant case is not whether Collins and James were principals or guarantors under the Uniform Real Estate Contract with the Baileys. The real question posed is whether a court, in the name of construction or interpretation, may designate Collins and James as "buyers" under a contract where all references to "buyer" in that contract refer solely to C & J Industries.

The importance of the question "who is the buyer under the contract?" comes from the wording of the acceleration clause in the Bailey contract which is triggered only by a sale or transfer by the "buyer". The Respondents and the trial court have unduly compounded an issue which this court viewed as simple:

> "It is apparent from the second contract . . .that the buyer under the first contract, C & J, is not the seller under the second contract." (Emphasis added.) 618 P.2d 58, 59.

Rules of construction of contracts support the simple and apparent conclusion drawn by this court on the first appeal of this case.

Parties to a contract are free to define terms or words in a contract. A contract will be interpreted in accord with the meaning assigned to words by the parties. When a word is used in one sense in one part of a contract, it is given the same meaning throughout. Radio Corp. v. Philadelphia Storage Battery Co., 6 A.2d 329 (Del. 1939); Holter v. National Union Fire Ins. Co., 459 P.2d 61 (Wash. 1969); 17 C.J.S. "Contracts" §303.

A court cannot rewrite an unambiguous contract for the purpose of accomplishing what in its opinion is proper. Sellgren v. Boyer, 297 P.2d 864 (Ore. 1956).

It is also improper for a court to review an agreement under the guise of construction or interpretation and then to provide for a contingency against which a party failed to protect himself. Noll Baking & Ice Cream Co. v. Sparks Milling Co., 26 N.E.2d 425 (Ill. 1940); McCallum v. Campbell-Simpson Motor Co., 349 P.2d 986 (Ida. 1960).

Examination of the unambiguous Uniform Real Estate Contract and the application of basic rules of construction reveal the apparency of the holding of this court on the first appeal.

Paragraph 1 of the Bailey contract acts as a definitional clause identifying the parties to the covenants in the contract. The clause states "C & J INDUSTRIES, INCORPORATED, a corporation, [is] hereinafter designated as Buyer." There are no intervening clauses between paragraph one and paragraph 3(a) that would support any conclusion but that the term "buyer" as used in paragraph 3(a) is a designation meaning "C & J Industries". The only act that could trigger the acceleration clause in paragraph 3(a) is a sale, transfer, etc., by C & J Industries.

The terms of the "Guaranty" also indicate a clear understanding by the parties that C & J, Collins and James were separate entities under the contract and only C & J was designated as buyer.

> ". . .[I]n order that Buyer may purchase said property said A. Robert Collins and Glade N. James desire to guaranty the performance of said Corporation, each personally and individually." (Emphasis added.)
>
> "Buyer, and A. Robert Collins and Glade N. James are each jointly and individually bound. . . ." (Emphasis added.)
>
> ". . .[A]nd said C & J Industries, Incorporated, a corporation, as buyer, and said A. Robert Collins and Glade N. James, individually and jointly. . . ." (Emphasis added.)

The signature block which appears at the end of the contract and at the end of the "Guaranty" also designates C & J as buyer.

> "BUYER:
>
> C & J INDUSTRIES, INCORPORATED
>
> By /s/ A. Robert Collins
>
> /s/ A. Robert Collins
> A. Robert Collins
>
> /s/ Glade N. James
> Glade N. James"

Even if an argument is made that there is ambiguity as to who is identified as buyer by the signature block, the ambiguity must be resolved against the Respondents as drafters of the contract and in favor of consistency in the use of the term "buyer", defined and used to mean C & J Industries throughout the text of the contract and guaranty.

Although a broader form could have been drafted, the acceleration clause in the Bailey contract provided only for the contingency of sale or transfer by the buyer. It is not the province of the courts of this state to determine the wisdom or folly of terms in a contract that are agreed upon by the parties. C & J was defined as buyer in the Bailey contract. The sale in the second contract was made by Collins and James as individuals. It is improper for a court under the guise of interpreting who is a principal to the contract to alter the unambiguous designation made by the parties naming C & J as buyer to also include Collins and James as buyers when the clear provisions of the contract are otherwise. To do so would be to create for Respondents a contract with covenants more advantangeous to them than those in the original contract they saw fit to enter. The basis of the holding of this court on the initial appeal that the buyer on the first contract is not the seller on the second contract is readily apparent.

POINT III

THIS COURT CAN NEITHER IGNORE THE CORPORATE STATUS OF C & J INDUSTRIES NOR PRESUME THE EXISTENCE OF AGENCY OF COLLINS AND JAMES AT THE TIME OF EXECUTION OF THE BURGIE CONTRACT.

The argument made in Point II (1) of Respondents' Brief is somewhat ambiguous. The heading indicates a contention that at the time of the execution of the Burgie contract, Collins and James were acting as agents of C & J Industries in distributing corporate assets following dissolution of the corporation.

If this is in fact the argument, an inherent weakness in it is the fact that C & J was found to be a de facto corporation at the time of the Burgie contract. (TR. 59, l. 14-23) The record supports this finding. The Burgie contract was executed on March 9, 1979, over two years prior to the issuance of the Certificate of Involuntary Dissolution of C & J Industries on March 31, 1981. It is therefore clear that there could have been no post-dissolution distribution by anyone at the time of the Burgie contract.

A close examination of the argument also reveals that no facts or bases are asserted in support of the contention that Collins and James acted as agents for C & J. The argument merely attempts to set forth a factual situation in which an agency relationship could exist, but gives no reason for concluding that the relationship did in fact

exist. No matter what setting is created for the Burgie contract, the issue of agency remains the same. This court is thus in a position where it is being asked to presume the existence of agency because of the relationship of the individuals to the corporation. Appellants therefore reassert the impropriety of such a presumption as set forth in Point IV of their first Brief.

POINT IV

THE EQUITABLE MAXIM "EQUITY REGARDS AS DONE THAT WHICH SHOULD BE DONE" IS NOT APPLICABLE TO THIS CASE.

The equitable maxim that equity regards as done that which should be done is applied only where there is an equitable obligation which creates a present duty to act on one party and a corresponding duty to perform on another. The principle does not operate in favor of every person but only for one who holds the equitable right to have the act performed as against the person upon whom the duty of performance has devolved. Pomeroy's Equitable Jurisprudence, 4th Ed., §365.

Case law reveals that for the maxim to apply, there must be an underlying agreement creating a present obligation to perform. Acts to be performed at a future date are not subject to the maxim. West Nesbitt, Inc., v. Ralston Purina Co., 266 A.2d 469 (Vt. 1970).

Appellants are unable to ascertain an agreement between themselves and Respondents that created any duty to act in regards to a contemplated dissolution of C & J Industries or which created any right in Respondents to have dissolution and distribution carried out. In absence of an agreement creating a present equitable duty in Appellants and a corresponding equitable right in Respondents, the equitable maxim is not applicable.

POINT V

THERE IS NO LEGAL BASIS FOR AN ARGUMENT THAT A CORPORATION CAN RATIFY THE ACTS OF INDIVIDUALS PERFORMED ON THEIR OWN BEHALF AND THUS MAKE THOSE ACTS ITS OWN.

> "Ratification does not result from the affirmance by the alleged principal of a transaction had by an alleged agent with a third person unless in the transaction the supposed agent purported to act on account of the reputed principal." (Emphasis added.) State v. Sundling, 281 P.2d 499 (Mont. 1955), citing Mechem on Agency; Restatement of the Law of Agency; Annotation 124 A.L.R. at 893; 2 C.J.S. "Agency" §41; 2 Am.Jur.2d "Agency" §222; and individual cases from 11 other jurisdictions.

Where an "agent" acts in his individual capacity it must be shown that the principal retained the benefits or there can be no ratification. Fuqua Homes, Inc. v. Grosvenor, 569 P.2d 854 (Az. 1977).

The findings of the lower court were stated as follows:

> "Now the evidence before me is that both individuals assumed they were signing as through it was their personal property" (TR. 59, l. 25-27).
>
> "But if those same individuals are buyers under Exhibit 1 and are therefore bound by Paragraph 3(a) it isn't going to make any difference whether or not they were acting as the agent on the sale of Exhibit 2 or whether they were selling personally." (TR. 59, l. 28-30; 60, l. 1-2)

It is clear that the trial court made no ruling on the credibility of the evidence concerning whether Collins and James acted in an individual capacity or as agents of C & J in contracting with Burgie. It would be improper for this court to ignore the only evidence presented as incredible and hold that Collins and James represented to act or bind C & J Industries on the Burgie contract. Inasmuch as the only evidence on record indicates that Collins and James acted as individuals in executing the Burgie contract and did not purport to bind C & J, there is no basis in law upon acts of Collins and James on their own behalf could be ratified by C & J.

Another well-settled principle of ratification is that the persons who wrongfully assumed the power to contract

cannot ratify their own acts on behalf of a corporation. Angelus Securities Corp. v. Ball, 67 P.2d 152 (Cal., 1937); McCray v. Sapulpa Petroleum Co., 226 P. 875 (Okla., 1923). Under this principle, Collins and James could not ratify their own acts even if they were made on behalf of C & J.

POINT VI

THE FACTS OF THIS CASE WILL NOT SUPPORT AN APPLICATION OF THE ALTER EGO DOCTRINE.

Respondents have correctly pointed out in their brief that there are two prerequisites to the application of the alter ego doctrine which ignores the corporate status of a corporation and equates the corporate entity with its individual owners.

> "(1) There must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., that the corporation is, in fact, the alter ego of one or a few individuals; and
>
> "(2) The observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." Norman v. Murray First Thrift, 596 P.2d 1028 (Utah 1979).

While the principle has been properly set forth, there is no indication of why the principle has any relevance or application to the facts of the instant case. Outside making sweeping allegations of fraud and inequity, Respondents have failed to demonstrate amy reason to apply this principle.

There hasn't even been an allegation that the first prerequisite, unity of interest and loss of separate personality, has been met. The record does not indicate the composition of the board of directors at the time of the Burgie contract. However, a document attached to Respondents' "Memorandum in Support of Defendants' Defense and Counterclaim to the Allegations of Plaintiffs' Complaint" indicates that at least in August of 1979 there were five directors of C & J Industries: A. Robert Collins, Glade N. James, Jessie Lee James, V. Darlene Collins and J. W. Downs. Of these five, only Robert Collins and Glade James were involved in the transaction questioned. The number and identity of the directors of the company is an essential element to show unity of interest and loss of separate personality of the corporation and owners.

Once again, Respondents ask this court to presume that fraud or inequity would result if the corporate form were to be observed. Certainly the record will not support an allegation that fraud has been pleaded or even offered in proof at trial.

Appellants have continued payments to the Respondents at all times since the execution of the first contract. Respondents have received and continue to receive the full

benefit of the bargain they made. Appellants maintain that Respondents' security interest has been enhanced by the Burgie contract or that in any case that Respondents remain fully secured by the original contract and the subsequent contract with Burgie.

At best, the alter ego principle may state a triable issue. In no instance has sufficient evidence been introduced whereby this court could affirm the decision of the trial court on the alter ego theory.

CONCLUSION

The provision of paragraph 3(a) of the Uniform Real Estate Contract between C & J Industries and the Baileys was not triggered by the sale to Burgie. The designated buyer in the first contract was not the seller in the second contract. There has been no proof that Collins and James acted as agents for C & J Industries when they individually executed a contract with Burgie.

For the foregoing reasons, Appellants respectfully petition this court to reverse the decision of the lower court.

Respectfully submitted,

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I hereby certify that I delivered two copies of the foregoing reply brief this 16th day of July, 1982, to Thomas A. Duffin and T. Quentin Cannon, 311 South State, Suite 380, Salt Lake City, Utah.

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